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Before the  
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705  
COMPETITION IN THE RAILROAD INDUSTRY

INITIAL COMMENTS

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Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits these Initial Comments in response to the decision of the Surface Transportation Board (STB), dated and served January 11, 2011, as amended February 4, 2011, in the above-captioned proceeding. 76 Fed. Reg. 2748-51 (Jan. 14, 2011).

The STB refers to the report which it "commissioned" Christensen Associates, Inc. to perform an "independent" study to examine "competitive access" issues. The STB's decision asserts the railroad industry has changed in many significant ways since "competitive access standards" were adopted in the mid-1980s, such as improving economic health of the railroad industry, increased consolidation in the Class I railroad sector, proliferation of a short line railroad network, and increased participation of rail customers in car ownership and maintenance, among other unspecified factors. However, the STB's decision states that productivity

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gains appear to be diminishing and, since 2004, overall railroad transportation prices have increased.<sup>2/</sup>

1. Railroad employees have a significant interest in rail competition issues. Rail employment levels are frequently impacted as a result of competitive matters; and rate levels resulting from competition have an obvious bearing upon carrier revenues, earning levels, and carrier ability to encourage fair wages and safe and suitable working conditions. Rail transportation policy, 49 U.S.C. 10101(3), (8), (11), among other criteria.

2. UTU-NY will carefully examine any proposals advanced in the instant proceeding which may suggest revision of present standards affecting "competitive access" or otherwise impacting the concerns of rail employees providing transportation in New York State, or to, from, or via New York State. The January 11, and February 4, 2011, decisions provide opportunity for responses by UTU-NY and other interests at later dates. Samuel J. Nasca, UTU's New York State Legislative Director, with long experience in the railroad industry, will provide necessary analysis of various proposals which may be submitted.

3. The January 11 decision invites comments on seven specific matters, primarily directed to comparisons between "pre-Staggers," and subsequent "Staggers' Effect" situations. (Decision, 1/11/11,

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<sup>2/</sup>The STB's January 11, 2011 decision discontinues two proceedings, Ex Parte No. 680, Study of Competition in the Freight Railroad Industry; Ex Parte No. 680 (Sub-No. 1), Supplemental Report on Capacity and Infrastructure Investment. (Decision, 1/11/11, at 3n.2). However, it does not appear that proceedings for these two dockets were ever instituted, and there is yet no discontinuance action entered in the public docket for these two matters.

at 6-7).<sup>3/</sup> However, apart from according legal sanction for contract rates,<sup>4/</sup> the 1980 Staggers Act was not the key substantive deregulatory statute; rather, it was the earlier 1976 so-called 4-R Act, which was the principal substantive deregulatory enactment although, to be sure, Staggers modified some of the innovations of the key 1976 legislation, such as exemptions,<sup>5/</sup> market dominance,<sup>6/</sup> intrastate rates,<sup>7/</sup> car service,<sup>8/</sup> rate bureaus,<sup>9/</sup> recyclables,<sup>10/</sup> and carrier divisions,<sup>11/</sup> among other refinements. For a detailed treatment of the 4-R and Staggers Act revisions, refuting the view of some economists claiming predominance of the Staggers Act, see: Stone, Richard D, The

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<sup>3/</sup> The STB's decision discourages comment on "Interchange Commitments." (Decision, 1/11/11, at 5). A recent court opinion suggests absence of serious antitrust issues in line spin-off situations where routing directive remains with the divesting carrier. BNSF Ry. Co. v. Albany & Eastern R.R. Co., 741 F.Supp.2d 1184, 1199-1201 (D.Or. 2010).

<sup>4/</sup> The former Interstate Commerce Commission approved various forms of incentive-loyalty and contract rates, but the railroad industry was reluctant, and was chided in this regard by then-Chairman Darius W. Gaskins on June 25, 1980, at the 51st Anniversary meeting of the ICC Practitioners' Assn. at Scottsdale, AZ. The ocean-shipping industry had encountered anti-trust problems with "dual rates" which may have served as a warning to rail carriers absent Congressional approval.

<sup>5/</sup>Cf. 4-R, §207; Staggers, §213.

<sup>6/</sup>Cf. 4-R, §202; Staggers, §201.

<sup>7/</sup>Cf. 4-R, §210; Staggers, §214.

<sup>8/</sup>Cf. 4-R, §212; Staggers, §224-6.

<sup>9/</sup>Cf. 4-R, §208; Staggers, §219.

<sup>10/</sup>Cf. 4-R, §204; Staggers, §204.

<sup>11/</sup>Cf. 4-R, §201; Staggers, §218.

Interstate Commerce Commission And The Railroad Industry (Praeger, 1991). <sup>12/</sup>

The key substantive deregulatory act following the 4-R Act, was the ICC Termination Act of 1995 (ICCTA), resulting in the closure of the ICC subsequent to the motor carrier over-charge/undercharge rate scandal. There were no Congressional hearings on the substantive provisions which ICCTA effected in rail carrier rates--the deliberations appear to have been between Congressional Staff and ICC Staff. However, key statutory provisions cited by the STB in the January 11, 2011 decision, for which comments are solicited, stem more importantly from ICCTA, rather than from Staggers. (Decision, 1/11/11, at 6-7).

4. It should be noted that the 4-R Act legislation primarily was directed not to deregulation, but instead to the reorganization of rail carriers in the Northeast following the Penn Central debacle. This is quite apparent from the table of contents in the 4-R Act. The rate and ICC reform features of the 4-R Act were overshadowed by provisions dealing with the Northeast problem. It was obvious that considerable federal funds would be required, such that protection of the public's investment in the process would be better secured with some rate and regulatory relief. As a result, rail carriers outside the region may have benefitted from changes effected by the 4-R Act. Similarly, the Staggers Act was primarily directed to the Conrail matter, and extended to the Rock Island and Milwaukee carriers which had been impacted by the

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<sup>12/</sup> In particular, Chapter 3-The Watershed Year:1976, may be of particular significance.

Northern Lines merger. From a deregulatory view, the legalization of contract rates was the principal feature.

5. The January 11 decision makes considerable reference to Christensen Associates. The involved individuals are not newcomers in attempts to understand the railroad industry. Their "The High Cost of Regulating U.S. Railroads" appeared in the January/February 1981 issue of Regulation, sponsored by the American Enterprise Institute. They now have a two-article update in the Winter 2010-11 issue of the same publication, now sponsored by the Cato Institute. The authors reference their work for the Surface Transportation Board.

The analysis of Christensen Associates is questionable. UTU-NY does not concur in its principal findings.

Respectfully submitted,



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